No.

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1979

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THE EATON CORPORATION, *Petitioner*

v.

OLGA J. FOX, *Respondent.*

---

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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Petitioner, the Eaton Corporation, prays that a writ of certiorari issue to review a judgement of the United States Court of Appeals for the Sixth Circuit reversing a judgment of the United States District Court for the Northern District of Ohio.

## OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit is reported at 615 F.2d 716 (6th Cir. 1980); it is set forth as Appendix B, *infra* pp. 5a.-14a. The opinion of the District Court is set forth in Appendix A, *infra* pp. 1a-4a.

## JURISDICTION

The judgment of the Sixth Circuit was entered on February 21, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## QUESTION PRESENTED

Whether the doctrine of tolling is appropriate to the statutory scheme of Title VII of the Civil Rights Act of 1964 and the time periods for suit set forth therein, and if so what the reach and application of that doctrine are?

## STATUTE INVOLVED

Section 2000e-5(f)(1) of Title 42 of the United States Code provides in pertinent part:

> . . . If a charge filed with the Commission pursuant to subsection (b) of this section is dismissed by the Commission, or if within one hundred and eighty days from the filing of such charge or the expiration of any period of reference under subsection (c) or (d) of this section, whichever is later, the Commission has not filed a civil action under this section or the Attorney General has not filed a civil action in a case involving a government, governmental agency, or political subdivision, or the Commission has not entered into a conciliation agreement to which the person aggrieved is a party, the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, shall so notify the person aggrieved and *within ninety days after the giving*

> *of such notice a civil action may be brought against the respondent* named in the charge (A) by the person claiming to be aggrieved or (B) if such charge was filed by a member of the Commission, by any person whom the charge alleges was aggrieved by the alleged unlawful employment practice. (Emphasis added.)

## STATEMENT

In this case, the United States Court of Appeals for the Sixth Circuit, in a 2-1 decision, has decided that a plaintiff who admittedly has failed to comply with the ninety-day requirement for filing suit under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(f)(1), may be excused from the stated requirement of that section if she has instead pressed the claim in a state court, under a mistaken but "reasonable" impression that she could litigate her Title VII claim in such a forum (App. 12a), even though the state court lacked jurisdiction to entertain her claim.

The Sixth Circuit ruled that in such a situation the period for filing the Title VII suit is tolled, despite the acknowledged absence of any circumstances establishing that the plaintiff was misled or otherwise prevented from filing her claim in a court possessing jurisdiction. Distinguishing this Court's decisions in *International Union of Electrical Workers v. Robbins & Myers, Inc.*, 429 U.S. 229 (1976), and *Johnson v. Railway Express Agency*, 421 U.S. 454 (1975), in which the Court refused to rule that filing periods had been tolled in a 42 U.S.C. § 1981 case and a Title VII case, respectively, the Sixth Circuit instead relied upon decisions of this Court from the FELA and general class action areas for authority for imposition of the tolling

doctrine (App. 10a, n.6.). Although the opinion below closed by characterizing the holding as "not a broad one" (App. 12a), the decision, in its imposition and application of a tolling doctrine under Title VII, goes far beyond this Court's most recent analysis of the issue in the *Robbins & Myers, Inc.* case, *supra,* and does so in the wake of this Court's more recent 4-4 affirmance without opinion in *Shell Oil Co. v. Dartt,* 434 U.S. 99 (1977) (Justice Stewart not participating), *rehearing denied* 434 U.S. 1042 (1978), where certiorari was granted with respect to very similar tolling questions involving substantially identical issues but where no resolution of those issues was achieved.

## PROCEEDINGS BELOW

In October of 1973, respondent, plaintiff below, filed suit in an Ohio state court, claiming breach of a collective bargaining agreement by virtue of defendant-petitioner's release of plaintiff from employment on August 30, 1972. Following plaintiff's receipt of a Title VII right-to-sue letter in December of 1974, plaintiff amended her complaint to allege a claim of sex discrimination under Title VII. Following trial in the Ohio state court, judgment was entered in favor of the defendant, and that judgment was affirmed by Ohio's intermediate appellate court. On appeal to the Supreme Court of Ohio, however, that court, *sua sponte,* held that its state courts lacked jurisdiction over Title VII actions and dismissed the action for lack of subject matter jurisdiction. *Fox v. Eaton Corp.*, 48 Ohio St. 2d 408, 358 N.E.2d 536 (1976).

Plaintiff, on February 18, 1977, filed the within Title VII action in the United States District Court for the

Northern District of Ohio, alleging essentially the same facts as she had alleged in the Title VII count of her state court action. The federal court action was, as the Sixth Circuit noted, timely filed if the ninety-day requirement of Title VII was tolled during the pendency of the Title VII claim in state court (App. 7a, n.2). The Sixth Circuit specifically pointed out that, although the parties had stipulated to the bringing of the action in state court, plaintiff had made no claim of having been misled into filing in state court and had made that decision on "her own" (App. 9a, n.5), and did not suggest that plaintiff was in any other respect prevented from timely filing her action in a court having jurisdiction to hear the claim.

The trial court dismissed the action on the ground that plaintiff had failed to comply with the ninety-day suit requirement of Title VII, holding that the time periods established under Title VII were jurisdictional and could not be tolled, and indicating that even if a tolling doctrine were applicable such tolling would not be appropriate under the circumstances of the case. The Sixth Circuit reversed, squarely holding in a 2-1 decision that the tolling doctrine could be imposed on Title VII's time requirements, and ruling that such doctrine applied even absent any misleading of plaintiff or any prevention of timely suit by plaintiff in a proper court. The court took the position that such tolling is appropriate where a plaintiff's late filing is admittedly the result of the plaintiff's own mistake, so long as the error is the result of plaintiff's "reasonable belie[f]" in the correctness of the erroneous position (App. 13a).

## REASONS FOR GRANTING THE WRIT

This Court should grant certiorari for the purpose of definitively resolving the important question of whether Title VII's time requirements permit imposition of a tolling doctrine, and, if so, for the purpose of furnishing lower courts with some guidance as to the reach and application of such a doctrine. While this Court's dictum in *International Union of Electrical Workers v. Robbins & Myers, Inc.*, 429 U.S. 229 (1976), touched upon the issue of tolling in respect of Title VII's time requirements, as subsequent Courts of Appeals decisions reveal, even what was said by way of dictum in *Robbins & Myers, Inc.* falls short of sufficiently addressing for those courts the basic question whether Title VII's time requirements permit a tolling doctrine. Moreover, if that decision can be read as permitting tolling, it does not furnish enough guidance with respect to the nature and application of the tolling doctrine in the Title VII statutory scheme. Indeed, subsequent to the dictum in *Robbins & Myers, Inc.*, the Court granted certiorari in *Shell Oil Co. v. Dartt*, 434 U.S. 99 (1977) (*per curiam affirmance by a divided Court*), *rehearing denied*, 434 U.S. 1042 (1978), for the apparent purpose of resolving controlling tolling issues, but those issues were left unresolved when the Court split evenly.[1]

Decisions of this Court which preceded *Robbins & Myers, Inc.* appeared to point away from any imposition of a tolling doctrine on Title VII's time requirements, by

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[1] Although *Dartt* arose under 29 U.S.C. § 626(d) of the Age Discrimination in Employment Act of 1967, the time requirements of that section closely parallel those of Title VII, and the *Dartt* cases are therefore being cited by Courts of Appeals as applicable to the question of whether tolling is permitted under Title VII. *See Chappell v. Emco Mach. Works Co.*, 601 F.2d 1295 (5th Cir. 1979); *Cottrell v. Newspaper Agency Corp.*, 590 F.2d 836, 838 (10th Cir. 1979); *Smith v. American President Lines, Ltd.*, 571 F.2d 102, 109 (2d Cir. 1978).

characterizing such requirements as "jurisdictional," in a context in which there was at least a suggestion that failure to meet such requirements would result in dismissal of a Title VII suit. Thus, in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 793-94 (1973), the Court, in unanimously refusing to hold that the absence of an EEOC finding of reasonable cause barred suit under Title VII, expressly referred to the plaintiff's compliance with the time requirements of Title VII as having "satisfied the jurisdictional prerequisites to a federal action," and refused to "engraft on the statute" an additional requirement of that kind inhibiting the review of Title VII claims. Similarly, in *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 47 (1974), a unanimous Court, in ruling that submission of a discrimination claim to labor arbitration did not bar a subsequent Title VII suit, expressly referred to Title VII's time requirement provisions as specifying "with precision the jurisdictional prerequisites that an individual must satisfy before he is entitled to institute a lawsuit." Contrasting a proposed implied requirement that a plaintiff's claim be free from prior arbitration with the express time requirements of Title VII, the Court ruled that there was no suggestion in the Title VII statutory scheme that failure to comply with this proposed implied requirement "either forecloses an individual's right to sue or divests federal courts of jurisdiction." *Ibid.* *See also Johnson & Railway Express Agency*, 421 U.S. 454 (1975).

Particularly against the backdrop of these earlier decisions, it is difficult to regard *Robbins & Myers, Inc.*, *supra*, as having authoritively decided the issue of the appropriateness of the tolling doctrine to the Title VII time requirements. As the four concurring Justices noted, 429 U.S. 229, 244, the case was decided on the basis of the

retroactivity of the new 180-day charge period in respect of plaintiff's claim, and the majority's discussion of the tolling doctrine was dictum. Moreover, discussion of that doctrine by the majority was less than positive about the tolling doctrine's being part of the Title VII statutory scheme. While it is true that the majority distinguished *Burnett v. New York Central R. Co.*, 380 U.S. 424, 428 (1968), on the ground that that decision had involved a situation where the plaintiff would otherwise have been "prevented" from filing an FELA claim, there is far more in the dictum which points away from the existence of a tolling doctrine for Title VII time requirements. Thus, the majority in *Robbins & Myers, Inc.* not only cited its prior decisions in *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974), and *Johnson v. Railway Express Agency*, 421 U.S. 454 (1975), favorably, but also declared that "we think that petitioners' arguments for tolling the statutory period for filing a claim with the EEOC during the pendency of grievance or arbitration procedures under the collective bargaining contract are virtually foreclosed by our decisions" in those cases. 429 U.S. 229, 236. The majority went on to underscore the binding nature of Title VII's time requirements by emphasizing that the Court in *Alexander v. Gardner-Denver Co., supra*, had "defin[ed] Title VII's jurisdictional prerequisites 'with precision,'" and by stating that Congress "gave no indication that it considered a 'slight' delay ... acceptable," and "did not leave to courts the decision as to which delays might or might not be 'slight.' " 429 U.S. 229, 240. It was no doubt such statements in *Robbins & Myers, Inc.* which caused this Court later, in *United Air Lines, Inc. v. Evans*, 431 U.S. 553, 555, n. 4 (1977), to cite both *Alexander v. Gardner-Denver Co., supra*, and *Robbins & Myers, Inc.*, for the proposition that "timely filing is a prequisite to the maintenance of a Title VII action."

It is not surprising, therefore, that *Robbins & Myers, Inc.* and its predecessors and successors, have created substantial confusion among the Circuits with respect to both the very existence of a tolling doctrine in the context of Title VII and, in those cases where Circuit Courts have opted for the doctrine, with respect to its reach and application. Indeed, despite the Sixth Circuit's decision in the instant case, even that court, less than six months earlier and subsequent to *Robbins & Myers, Inc.*, while opting for the tolling doctrine in the context of a clear misleading of the plaintiff, candidly acknowledged in *Leake v. University of Cincinnati*, 605 F.2d 255, 259 (6th Cir.), *rehearing in banc denied*, Oct. 10, 1979, that "the Supreme Court has not squarely addressed the precise issue presented here; that is, whether Title VII time periods may be tolled on equitable grounds." 605 F.2d 255, 259.

Contrary to the Sixth Circuit's broad imposition of the tolling doctrine in the instant case, two Circuits, the First and the Second, have analyzed *Robbins & Myers, Inc.* and other decisions of this Court touching upon the tolling doctrine problem and have flatly ruled that the various Supreme Court decisions to date leave the matter an "open question." In *Daughtry v. King's Dept. Stores, Inc.*, 608 F.2d 906, (1st Cir. 1979) (*per curiam*), the First Circuit, citing *United Air Lines, Inc. v. Evans*, 431 U.S. 553, 555 (1977), for the proposition that failure to comply with Title VII's time requirements is a "procedural prerequisite to the District Court's entertaining the case," which "precluded relief under the statuory scheme in the District Court," 608 F.2d 906, 908, noted as well this Court's references in *Robbins & Myers, Inc.*, to "jurisdictional prerequisites," *ibid.*, and concluded by

declaring "the entire statute of limitations and jurisdictional requirements issue open for another day." *Id.* at 909.

The Second Circuit in *Smith v. American President Lines, Ltd.*, 571 F.2d 102 (2d Cir. 1978), while also concluding that the Court's decisions left the tolling issue "still open in this Circuit," 571 F.2d 102, 109, was even more suggestive of doubt as to the doctrine's place in the Title VII statutory scheme than the First Circuit in *Daughtry v. King's Dept. Stores, Inc., supra.* Thus, in *Smith* the Second Circuit cited the pre- *Robbins & Myers, Inc.*, decisions of this Court and language from *Robbins & Myers, Inc.*, itself, and described footnote 10 of *Robbins & Myers, Inc.*, as having simply "left open the possibility" of a tolling doctrine in a decision which also "strongly suggests that, even assuming the Title VII time limits are not strictly jurisdictional, the tolling of those limits may be very restrictive." 571 F.2d 102, 109.

While the Seventh Circuit, in *In re Consolidated Pretrial Proceedings*, 582 F.2d 1142 (7th Cir. 1978), did not squarely face the tolling question, that court did decide whether the time limits of Title VII were jurisdictional in a context which indicates that that Court may well disagree with the Sixth Circuit with respect to the tolling issue decided in the instant case. In ruling that Title VII's time limits established jurisdictional prerequisites to suit, so that such time limits could be asserted at any time, the court said:

> The critical issue is whether the 90-day period is in the nature of a statute of limitations in which case the doctrines of waiver and estoppel would apply, or is a jurisdictional prerequisite to suit in which case the employer could raise it at any time. We hold the 90-day filing period to be

> jurisdictional and therefore the employer's failure to plead it did not constitute a waiver. 582 F.2d 1142, 1151.

The court went on to note that "other circuits are split on the issue," *id.*, n. 16, and indicated that the applicable legislative history contained nothing indicating that the time limits of Title VII were not jurisdictional, 582 F.2d 1142, 1151, a view shared by the Ninth Circuit in *Wong v. Bon Marche,* 508 F.2d 1249 (9th Cir. 1975).

Even courts which have, subsequent to *Robbins & Myers, Inc.,* indicated that the tolling doctrine applies to the Title VII time limits have done so gingerly and tentatively, and have indicated some doubt as to the real reach and application of that doctrine, and while recognizing the doctrine, have refused to apply it to cases before them. Such courts, for example, have read *Robbins & Myers, Inc.,* as "leaving open the possibility" of a tolling doctrine in "certain limited cases," *Hart v. J.T. Baker Chem. Corp.,* 598 F.2d 829, 833 (3d Cir. 1979); or have interpreted applicable decisions of this Court as "suggesting" that Title VII's requirements are not a jurisdictional prerequisite in the "same sense" as other jurisdictional requirements, *Chappell v. Emco Mach. Works Co.,* 601 F.2d 1295, 1298 (5th Cir. 1979); or have decided only that the applicable authorities permit a court to "assume *arguendo*" that the Title VII time limits are subject to "potential" equitable tolling, *Cottrell v. Newspaper Agency Corp.,* 590 F.2d 836, 838 (10th Cir. 1979).

The *Cottrell* case, *supra,* highlights, moreover, the extent to which this Court's evenly divided decision in *Shell Oil Co. v. Dartt,* 434 U.S. 99 (1977), *rehearing denied,* 434 U.S. 1042 (1978), *affirming per curiam by an equally divided court, Dartt v. Shell Oil Co.,* 539 F.2d 1256

(10th Cir. 1976), has created further confusion. While the Tenth Circuit in *Dartt* itself had squarely decided the closely parallel issue of the existence of a tolling doctrine for purposes of age discrimination claim periods, the Tenth Circuit, later *citing* this Court's subsequent decision in *Robbins & Myers, Inc.*, and this Court's decision in *Dartt*, retreated in *Cottrell*, and decided to assume the existence of the tolling doctrine in the Title VII context only "*arguendo.*" 590 F.2d 836, 838. This, while the Sixth Circuit, on the basis of its reading of the same decisions of this Court, was preparing to push the doctrine sharply ahead in Title VII actions.

## CONCLUSION

The panoply of Circuit Court decisions with respect to both the existence of the tolling doctrine in the Title VII statutory scheme, and the reach and application of such a doctrine if it is appropriate, are confused, hesitant, and conflicting in approach.[2] Indeed, even the decision relied on so heavily by the Sixth Circuit in the instant case, *Bethel v. Jefferson*, 589 F.2d 631 (D.C. Cir. 1978), reached the result it did only by piecing together various positions taken by various members of the Court in a collection of separate decisions. *See* 589 F.2d 631, 641-42, n. 64.

The Circuits, and Title VII litigants as well, need something more than a patchwork of language from separate decisions and Justices to guide them in this area. The need for resolution of these issues is at least as great today as it was when this Court granted certiorari in *Shell*

[2] The same problems which have produced this state of affairs will, it is suggested, affect decisions of those additional Circuits which have not, subsequent to *Robbins & Myers, Inc.* confronted this issue.

*Oil Co. v. Dartt.* The instant case is a perfect vehicle for addressing these basic issues, for as the dissenting opinion below points out (App. 13a, 14a), the Sixth Circuit's decision extends the tolling doctrine to materially different circumstances than even other courts endorsing the doctrine have viewed as justifying resort to the doctrine.

This Court should grant certiorari to definitively resolve the basic question of whether the tolling doctrine is appropriate to the Title VII statutory scheme, and, if so, to resolve what the reach and application of that doctrine are.

Respectfully submitted,

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May 21, 1980

# APPENDIX

**APPENDIX A**

# THE UNITED STATES DISTRICT COURT

**THE NORTHERN DISTRICT OF OHIO**

**EASTERN DIVISION**

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| | |
|---|---|
| OLGA J. FOX<br>*Plaintiff*<br>v.<br>EATON CORPORATION,<br>*Defendant* | **CIVIL ACTION NO. C77-175**<br><br><br>**MEMORANDUM AND ORDER** |

KRUPANSKY, J.

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This is a civil rights proceeding instituted pursuant to the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.* Defendant has filed a Motion to Dismiss for lack of jurisdiction over the subject matter. Upon review of the pleadings herein, the Court concurs that it is not possessed of jurisdiction and must therefore dismiss the action with prejudice, pursuant to Rule 12(h)(3), Fed. R. Civ. P.

The Complaint, which would seem to assert a claim for unlawful discrimination on the basis of sex, does not even allege that plaintiff filed a charge with the Equal Employment Opportunity Commission (EEOC) or otherwise state the nature of the allegations asserted in any such charge. However, plaintiff does allege in the Complaint that she received a Notice-to-Sue Letter from the EEOC on December 6, 1974.

The Complaint further avers that plaintiff commenced a civil action in the Court of Common Pleas, Cuyahoga County on October 23, 1973, but fails to state the nature of said action,

the name of the defending party or the relation that the Common Pleas action bears to the instant proceeding. Plaintiff avers that the commencement of the Common Pleas action tolls the statute of limitations on her Title VII claim filed in this Court.

The Complaint alleges that the state action was tried and was appealed to the Ohio Court of Appeals for the Eighth Appellate District, but fails to allege the name of the successful party or the nature of that Common Pleas Court decision. Finally, plaintiff asserts that the state action was appealed to the Supreme Court of Ohio, which found "that the Ohio Court had no jurisdiction over the subject matter of the cause, reversed the finding of the Court of Appeals and dismissed the cause otherwise than on the merits." The Court infers from the vague allegations of the Complaint that the state action proceeded on the basis of a Title VII claim. No where in the Complaint, however, does plaintiff draw any factual relation between that cause of action and the one presently before this Court.

The aforementioned decision of the Supreme Court of Ohio, the citation to which was furnished by defendant, (*Fox* v. *Eaton Corp.*, 48 Ohio St. 2d 236 (1976)), determines, without discussing the underlying cause of action, that state tribunals are not possessed of jurisdiction over actions instituted pursuant to 42 U.S.C. §2000e. In support of her contention that the statute of limitations on her Title VII action is tolled by the commencement of the Common Pleas suit, plaintiff asserts that that state courts enjoy concurrent jurisdiction with federal courts over Title VII actions. While this Court does not sit as an appellate court and does not here pass upon the propriety of the decision of the Supreme Court of Ohio in *Fox* v. *Eaton Corp.*, *supra*, the Court does pause to observe the soundness of that decision. To the federal courts alone is assigned the power to enforce complaince with Title VII. *Hutchings* v. *United States Industries, Inc.*, 428 F.2d 303 (5th Cir. 1970); *Pettway* v.

*American Cast Iron Pipe Company*, 411 F.2d 998 (5th Cir. 1969).

The Court furthermore determines that at the time this Complaint was filed on February 18, 1977, almost 2½ years had elapsed since plaintiff's receipt of her Notice-to-Sue letter on December 6, 1974. Pursuant to 42 U.S.C. §2000e-5(f)(1), plaintiff must commence her action in the district court within 90 days of the receipt of the Notice-to-Sue letter or be forever barred from litigating her claim. This provision is jurisdictional and the failure to file a complaint within the prescribed time period deprives the Court of jurisdiction over the subject matter. *Hinton* v. *CPC International, Inc.*, 520 F.2d 1312 (8th Cir. 1975); *DeMatheis* v. *Eastman Kodak Company*, 511 F.2d 306 (2d Cir.), modified, 520 F.2d 409 (2d Cir. 1975); *Thornton* v. *East Texas Motor Freight*, 497 F.2d 416 (6th Cir. 1974); *Marlowe* v. *Fisher Body*, 489 F.2d 1057 (6th Cir. 1973); *Genovese* v. *Shell Oil Company*, 488 F.2d 85 (5th Cir. 1973); *Huston* v. *General Motors Corporation*, 477 F.2d 1003 (8th Cir. 1973); *Goodman* v. *City Products Corp., Ben Franklin Division*, 425 F.2d 702 (6th Cir. 1970).

The 90-day limitation is adhered to strictly, and will not be tolled, particularly under circumstances such as those presented here, where the Complaint was erroneously prosecuted in a court that lacked jurisdiction. Only after a final adverse ruling in that action did plaintiff institute proceedings in this Court. Plaintiff's error cannot be corrected by simply refiling the action in another court.

Even in those circumstances when a Title VII litigant has properly instituted proceedings in a district court of the United States within the statutory time limit, and that action is subsequently dismissed then refiled, the 90-day period of limitations is not tolled by the filing of the original Complaint. Nor is the filing date of the second Complaint retroactive to the filing date of the original Complaint. *Hall* v. *Kroger*, 520 F.2d 1204 (6th Cir. 1975); *Cleveland* v. *Douglas Aircraft Company*,

509 F.2d 1027 (9th Cir. 1975); *McClendon* v. *North American Rockwell,* 2 FEP Cases 593 (C.D. Calif. 1970).

Therefore, upon consideration, the Court finds that plaintiff did not file her Complaint within the 90-day statutory limit, that the period of limitation was not tolled by the state court action and that this Court consequently lacks jurisdiction over the subject matter of the Complaint. Accordingly, defendant's Motion to Dismiss is granted and the Complaint is hereby dismissed with prejudice.

IT IS SO ORDERED.

KRUPANSKY, J.

APPENDIX B

# No. 77-3374

# UNITED STATES COURT OF APPEALS

## FOR THE SIXTH CIRCUIT

---

OLGA J. FOX,

*Plaintiff-Appellant,*

v.

THE EATON CORPORATION,

*Defendant-Appellee.*

APPEAL from the United States District Court for the Northern District of Ohio.

---

Decided and Filed February 21, 1980

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Before: CELEBREZZE, BAILEY BROWN and JONES, Circuit Judges.

BAILEY BROWN, Circuit Judge, delivered the opinion of the Court in which JONES, Circuit Judge, concurred. CELEBREZZE, Circuit Judge, (pp. 9-10) delivered a separate dissenting opinion.

BAILEY BROWN, Circuit Judge. The appellant, Olga J. Fox (Fox), appeals from a judgment of the district court dismissing her Title VII action based on alleged sex discrimination. The district court held, on a motion to dismiss, that, since Fox had failed to commence this action in federal court within ninety days of receiving her right-to-sue letter, her action must be dismissed as untimely filed.

I

Fox was employed by the appellee, the Eaton Corporation (Eaton), from 1942 until 1972. On August 30, 1972, Fox was released from employment when the plant at which she was working was closed. In October, 1973, she brought an action in an Ohio state court claiming Eaton had breached the collective bargaining agreement. Fox alleged that Eaton had improperly computed her credited service in determining her eligibility for early retirement benefits.

Sometime in 1974, shortly before trial, Fox sought to amend her complaint to include a claim based on Title VII of the Civil Rights Act of 1964. The amendment alleged a claim of sex discrimination by alleging, *inter alia*, that she had not been given service credit for the time taken as maternity leave. The amendment was allowed when Fox received a right-to-sue letter in December, 1974.[1] Prior to trial the parties agreed to stipulate that Fox had a right to bring a Title VII action in the state court. Following a trial on the merits, the state court entered a judgment in favor of Eaton. That decision was affirmed by one of the Courts of Appeal of Ohio. On appeal to the Supreme Court of Ohio, that court *sua sponte* held that state courts lack jurisdiction over Title VII actions. Accordingly, the Supreme Court of Ohio reversed the decision of the lower court and dismissed Fox's action for lack of jurisdiction. The Ohio Supreme Court decision was rendered on December 15, 1976. *Fox* v. *Eaton Corp.*, 48 Ohio St. 2d 408 (1976).

On February 18, 1977, Fox filed this Title VII action in federal district court alleging essentially the same facts that had

[1] It is unclear from the record in this case not only when the alleged act of discrimination occurred but also when Fox filed her discrimination charge with the EEOC. The district judge took note of the fact that the complaint did not allege the filing of a charge with the EEOC or the date thereof but did not dismiss the complaint on this basis. Accordingly, we cannot and do not determine whether the plaintiff filed a discrimination charge within 180 days of the alleged act of discrimination. That issue will have to be determined by the district court on remand.

been the basis of her previous state court action.[2] Eaton filed a motion to dismiss claiming that Fox had not commenced the action within ninety days of receiving her right-to-sue letter as required by 42 U.S.C. § 2000e-5(f)(1). The district court, in granting Eaton's motion, concluded that the time periods established under Title VII were jurisdictional in nature and therefore could not be tolled. The district court implied that even if the time periods were subject to tolling, such tolling would not be proper under the circumstances of this case.

II

Since the district court's decision, this court has held that the Title VII time periods "are jurisdictional in the sense that that phrase is used in relation to statutes of limitations and equitable principles should apply in circumstances which warrant their application." *Leake* v. *University of Cincinnati,* 605 F.2d 255 (6th Cir. 1979).[3] *See also Hart* v. *J.T. Baker Chemical Corp.,* 589 F.2d 829 (3rd Cir. 1979); *Laffey* v. *Northwest Airlines, Inc.,* 567 F.2d 429, 475 (D.C. Cir. 1976); *Reeb* v. *Economic Opportunity Atlanta, Inc.,* 516 F.2d 924 (5th Cir. 1975).[4] The issue presented in this appeal is whether the

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[2] If the ninety-day limitation was tolled during the pendency of the Title VII action in the state courts, this Title VII action was timely filed in federal district court.

[3] This decision in *Leake,* however, was clearly presaged by earlier decisions of this court which were cited and relied upon therein.

[4] In each of these cases, the court held that equitable principles may warrant the tolling of the time period for filing a discrimination charge with the EEOC. We believe that the rationale of these cases is equally applicable to the time period for commencing a civil action. *Contra, Dunlap* v. *Sears, Roebuck & Co.,* 21 FEP Cases 417 (E.D. Pa. 1979). *Dunlap* cites *Goodman* v. *City Products Corp.,* 425 F.2d 702 (6th Cir. 1970), as authority for the proposition that this time limitation cannot be tolled. Actually, *Goodman* only holds that the statutory language that the action "may" be filed in ninety days is mandatory and not directory but also recognizes the possibility of tolling under proper equitable circumstances. If anything, this time period is more in the nature of a statute of limitations than the time period for filing a discrimination charge.

facts of this case justify the application of equitable principles of tolling.

In *Leake* v. *University of Cincinnati, supra,* this court held that affirmative representations by the employer which cause the employee to delay in filing discrimination charges with the EEOC are sufficient to toll the applicable Title VII time period. Other courts which have considered whether the Title VII time period for filing an action may be tolled have indicated that deception may toll this period. *See Cottrell* v. *Newspaper Agency Corporation,* 590 F.2d 836 (10th Cir. 1979); *Trader* v. *Fiat Distributors, Inc.,* 20 FEP Cases 1148 (D. Del. 1979). *See also Ceromette* v. *General Motors Corporation,* ____ F.2d ____, NO. 77-1184 (6th Cir. December 3, 1979), which deals with a late filing of a charge with the EEOC. Conduct by the *employer* which reasonably leads the employee to delay in pursuing his claim certainly presents the clearest and the most justifiable example of a situation in which Title VII time periods should be tolled. *See Smith* v. *American President Lines, Ltd.,* 571 F.2d 102, note 12 at 109 (2d Cir. 1978). But courts have not hesitated to at least consider and in some circumstances to apply equitable tolling principles in contexts in which the employer's conduct has not caused the employee to delay in pursuing his claim. *See Chappell* v. *Emco Machine Works Company,* 601 F.2d 1295 (5th Cir. 1979) (Title VII time periods not tolled when employee relied on statements of employee of state agency that complaint with EEOC had been filed for her, but see dissent at 1304); *Hart* v. *J.T. Baker Chemical Corp., supra* (time periods not tolled when employee knew basic facts supporting discrimination charge at the time of her termination); *Smith* v. *American President Lines, Ltd., supra,* (tolling of time periods not appropriate simply because employer failed to post, as required by statute, notice to employees of rights under Title VII); *Page* v. *U.S. Industries, Inc.,* 556 F.2d 346 (5th Cir. 1977), *cert. denied,* 434 U.S. 1045 (1978) (Title VII time period for filing a civil complaint tolled on the basis of a misleading letter written by the EEOC); *Reeb*

v. *Economic Opportunity Atlanta, Inc., supra,* (Title VII time period for filing a discrimination charge tolled until facts supporting discrimination were apparent or should have been apparent to employee). Without categorizing or defining the various circumstances which might warrant the tolling of the Title VII time periods, we conclude that such tolling is appropriate, even in the absence of any misleading conduct by the employer, when the employee files a timely Title VII action in a court and there exists a reasonable legal theory for invoking the jurisdiction of that court.[5]

The Supreme Court has in two contexts held statutes of limitations to be tolled during the pendency of an event or condition which satisfied the underlying purposes of the particular statute of limitations. *See Johnson* v. *Railway Express Agency,* 421 U.S. 454, 475 (1975) (Marshall, J., dissenting). Thus, the Court has held that when a plaintiff files an FELA action in a state court with proper jurisdiction and that action is subsequently dismissed for improper venue, the FELA statute of limitations is tolled during the pendency of the state action. *Burnett* v. *New York Central Railroad Company,* 380 U.S. 424 (1968). In addition, the Court has held that the commencement of a class action tolls the applicable statute of limitations for every member of the alleged class at least until such time as the court decides the class certification issue. *American Pipe & Construction Company* v. *Utah,* 414 U.S. 538 (1974). *See also United Airlines* v. *McDonald,* 432 U.S. 385 (1977). In each of these cases, the underlying purpose of the particular statute of limitations was satisfied by the filing of the original action in that the defendant received timely notice of the statutory claim and the plaintiff displayed diligence in

[5] Fox contends that Eaton misled her by stipulating that the state court had jurisdiction. It is well established that two parties cannot create jurisdiction by stipulation. But more importantly, it is not alleged that Eaton made any misrepresentations which caused Fox to file her action in state court. That decision was her own. Accordingly, we cannot consider this case to be one involving misleading conduct by the employer.

asserting his or her rights. In neither case was the defendant subjected to any unfairness.[6]

This case is obviously distinct from either *Burnett* or *American Pipe* in that Fox's original state action was dismissed for lack of jurisdiction. We believe that, as a general matter, the filing of an action in a court that clearly lacks jurisdiction will toll the statute of limitations. But in this case, the lack of jurisdiction in the state court was far from clear. Those courts that have directly confronted this issue have reached conflicting conclusions.[7] *See Peterson* v. *Eastern Airlines,* 20 FEP Cases 1322 (W.D. Texas 1979); *Bennun* v. *Board of Governors,* 413 F.Supp. 1274 (D.N.J. 1976); *Peper* v. *Princeton University, Board of Trustees,* 77 N.J. 55, 389 A.2d 465 (1978); *Vason* v. *Carrano,* 31 Conn.Super. 338, 330 A.2d 98 (1974) (holding state courts have concurrent jurisdiction). *See also Dickinson* v. *Chrysler Corp.,* 458 F.Supp. 43 (E.D. Mich. 1978); *Fox* v. *Eaton Corp.,* 48 Ohio St. 2d 408 (1976); *Lucus* v. *Tanner Bros. Contracting Corp.,* 10 FEP Cases 1104 (Arizona 1974) (holding federal courts have exclusive jurisdiction). At the time Fox filed her action in state court, there was no controlling decision, and particularly no decision by the Supreme Court of Ohio, that would indicate that federal courts have exclusive jurisdiction over Title VII actions. Given the absence of any such controlling decision and given the conflicting decisions reached by

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[6] In *Johnson* v. *Railway Express Agency, supra,* the Supreme Court held that the statute of limitations applicable to actions under 42 U.S.C. §1981 was not tolled by the pendency of a Title VII proceeding. In *International Union of Electrical Radio and Machine Workers, Local 790* v. *Robbins & Myers, Inc.,* 429 U.S. 229 (1976), the Court held that the Title VII time period was not tolled during the pendency of grievance proceedings. We believe that both *Johnson* and *Electrical Workers* are distinguishable from this case in that in those cases the defendant did not receive timely notice of the specific statutory claim that was subsequently asserted by the plaintiff.

[7] We need not and therefore do not consider whether federal courts have exclusive jurisdiction over Title VII actions. We only note that the question is not an easy one, particularly given the absence of any language in the statute specifically excluding jurisdiction from the state courts. *See Dowd Box Co.* v. *Courtney,* 366 U.S. 502 (1962).

other courts, we do not believe that Fox should be prejudiced for having adopted the jurisdictional theory which the court ultimately decided not to accept.

The Court of Appeals for the District of Columbia recently reached a similar conclusion in an analogous situation. In *Bethel* v. *Jefferson,* 589 F.2d 631 (D.C. Cir. 1978), the D.C. Circuit considered for the first time whether employees of the District of Columbia were required to follow the procedures of the Civil Service Commission or the procedures of the EEOC. Even though the court determined that the particular plaintiffs in that case were required to file discrimination charges with the EEOC, it did not penalize them for having resorted to the Civil Service Commission.

> [S]urely it would be hypertechnical, if not downright unrealistic, to require nonlawyers to study the statute, its legislative history and its administrative interpretations and predict accurately which of two quite reasonable constructions of the unclear language a court will adopt.

589 F.2d at 642.

We believe that it would be equally unrealistic and equally inappropriate to force an employee even with the assistance of an attorney to predict which one of two reasonable jurisdictional theories a court may adopt.

Accordingly, we hold that Fox's commencement of a Title VII action in state court was sufficient to toll the ninety day period within which she was required to commence a civil action. This result is consistent with the rationale of the Supreme Court in *Burnett* v. *New York Central Railroad Company, supra* and *American Pipe & Construction Company* v. *Utah, supra.* Certainly the purpose underlying the particular

time period was satisfied.[8] Eaton was not confronted by a stale claim. Nor was it deprived of an opportunity to preserve the appropriate evidence. Throughout these proceedings, Fox has exercised great diligence, however unartfully, in pursuing her claim. Her only misfortune lay in the selection of an inappropriate forum. That selection, however, was not without a reasonable basis. Under these circumstances, we think the tolling of the ninety day time period is consistent not only with the specific purpose of that time period but also with the general remedial purposes of Title VII.

As has been pointed out herein, many of the decisions holding that the Title VII time periods are in the nature of statutes of limitations and therefore can be tolled (and particularly *Leake, supra*), are of recent vintage and were not available at the time this action was dismissed. Moreover, the complaint herein was very unartfully drawn and supported at the time the motion to dismiss was presented. For these reasons, we can well understand why the district judge reached the conclusion that the action should be dismissed as time barred.

Our holding in this case is not a broad one. We only hold that the ninety day time limitation for filing a civil action is

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[8] The general purposes of statutes of limitations were outlined by the Supreme Court in *Burnett* v. *New York Central Railroad Company, supra* at 428:

> Statutes of limitations are primarily designed to assure fairness to defendants. Such statutes "promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared. The theory is that even if one has a just claim it is unjust not to put the adversary on notice to defend within the period of limitation and that the right to be free of stale claims in time comes to prevail over the right to prosecute them." *Order of Railroad Telegraphers* v. *Railway Express Agency, Inc.*, 321 U.S. 342, 348-349. Moreover, the courts ought to be relieved of the burden of trying stale claims when a plaintiff has slept on his rights.

tolled by filing a civil action within ninety days in a state court which plaintiff reasonably believed possessed subject matter jurisdiction. Accordingly, the judgment of the district court is reversed and the case is remanded for further proceedings.

CELEBREZZE, J., dissenting. With due deference to the views of the majority, I must respectfully dissent.

I adhere to the principles articulated by this court in *Leake* v. *University of Cincinnati*, 605 F.2d 255, 259 (6th Cir. 1979), that "Title VII time limitations are jurisdictional in the sense that that phrase is used in relation to statutes of limitations and equitable principles should apply in circumstances which warrant their application." I disagree, however, with the majority view that the present case justifies the exercise of such equitable power and the tolling of the 90-day time period.

In my view, the factual context of *Leake, supra*, justifying the tolling of the time limitations is eminently distinguishable from the present case. In *Leake*, we held that affirmative representations by an employer which cause an employee to delay filing his discrimination charges with the EEOC are sufficient equitable considerations to justify a tolling of the time periods. In the present case, we have no such "foul play" on the employer's behalf which should preclude him from raising the time period defense.

It is well established that the tolling of statutory periods on equitable grounds is usually very much restricted. *International Union of Electrical Radio and Machine Workers, Local 790* v. *Robbins & Myers, Inc.*, 429 U.S. 229 (1976); *Geromette* v. *General Motors Corp.*, No. 77-1184 (6th Cir. December 3, 1979). In *Robbins & Myers*, the Supreme Court implied that tolling might be appropriate only where the defendant has actively misled the plaintiff respecting the cause of action, where plaintiff has in some extraordinary way been prevented from asserting his rights, or where the plaintiff has raised the precise statutory claim in issue in a court of competent jurisdiction but has mistakenly done so in a state court without proper

venue. *Id.* at 237 n.10 and accompanying text; *Chappel* v. *Emco Machine Works Co.*, 601 F.2d 1295, 1302-03 (5th Cir. 1979); *Smith* v. *American President Lines, Ltd.*, 571 F.2d 102, 109 (2d Cir. 1978).

From my reading of the record, I cannot conclude that the present case falls within any of the above instances. As already stated above, and the majority agrees, there is no evidence that defendant-appellee engaged in any conduct which resulted in appellant's filing of her claim in state court. *See ante* n.5 at 5. Additionally, the record is devoid of any evidence which would lead to the conclusion that appellant has in some extraordinary way been prevented from asserting her rights. *Burnett* v. *New York Central R. Co.*, 380 U.S. 424, 429 (1965); *Osbourne* v. *United States*, 164 F.2d 767 (2d Cir. 1947). Nor has appellant filed her claim in a state court of competent jurisdiction which did not have proper venue over her claim. *Burnett, supra*, 380 U.S. at 426-36.

In *Burnett*, the Supreme Court was confronted with a tolling inquiry regarding the three-year statute of limitations under the Federal Employer's Liability Act (FELA). In *Burnett*, the court held that where a timely FELA action is begun in a state court *having jurisdiction*, the defendant is served with process, and the case is dismissed for improper venue, the FELA time limitation is tolled during the pendency of the state suit. Our case is distinguishable from *Burnett*. The court in *Burnett* was careful to limit its holding to those instances where the state court clearly had concurrent jurisdiction, a situation which does not exist in the present case. In light of the policy that equitable grounds justifying tolling should be very restricted, in my view *Burnett* should not be extended to cover the instant case.

Since I find no equitable basis for the tolling of the 90-day time period, I would affirm the judgment of the district court.

No. 79-1856

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1980

THE EATON CORPORATION, *Petitioner*

v.

OLGA J. FOX, *Respondent*

**On Petition For Writ of Certiorari To The United States Court of Appeals For The Sixth Circuit**

## SUPPLEMENTAL MEMORANDUM OF PETITIONER

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## SUPPLEMENTAL MEMORANDUM OF PETITIONER

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## NEW DEVELOPMENTS

This supplemental memorandum is filed to call the Court's attention to four recent cases not available when Eaton filed its Petition for Writ of Certiorari in the above-captioned matter. That petition outlined the uncertainty posed by decisions of this Court with respect to the existence and application of the tolling doctrine to Title VII time requirements, and noted the resulting confusion and conflict in approach toward this basic question among the Circuits. The cases discussed herein demonstrate continued confusion among the Courts of Appeals, and

indeed the decision of the Eighth Circuit in one of those cases, *Harris v. Norfolk & Western Railway,* 616 F.2d 377 (8th Cir. 1980), is in direct conflict with the decision of the Sixth Circuit in the instant case. In addition, this Court handed down a decision at the end of last Term in *Mohasco Corp. v. Silver,* 100 S.Ct. 2486 (1980), which adopted an approach to Title VII filing requirements which appears to be at odds with the approach of the Sixth Circuit in the instant case, and which points up the need for further guidance in this area for lower courts.

## I.

The Sixth Circuit's decision below, tolling Title VII filing requirements to excuse delay occasioned by the plaintiff's mistakened earlier filing of suit in a state court lacking jurisdiction to hear her claim, is now in conflict with the Eighth Circuit's recent decision in *Harris v. Norfolk & Western Railway,* 616 F.2d 377 (8th Cir. 1980). In *Harris,* the Eighth Circuit, citing this Court's decision in *International Union of Electrical Workers v. Robbins & Meyers, Inc.,* 429 U.S. 229 (1976), refused to toll Title VII time limits to excuse the delay which occurred when the plaintiff mistakenly postponed his Title VII filing to pursue collective bargaining remedies before the National Railroad Adjustment Board. Like the plaintiff in the present case, the plaintiff in *Harris* argued for tolling on the ground that his procedural error was the result of a reasonable mistake, claiming that "he justifiably felt that he was required to take his complaint to the Railroad Adjustment Board before proceeding under the Civil Rights Act of 1964." 616 F.2d at 380.

The plaintiff in *Harris* buttressed his argument by noting that *Robbins & Meyers* had not been decided until four years after his filing with the National Railroad Adjustment Board and by pointing to decided law which clearly required him to exhaust his administrative remedies before filing suit under the collective bargaining agreement. Yet the Eighth Circuit, unlike the Sixth Circuit in the instant case, refused to apply a tolling doctrine to excuse a delay, claimed to have resulted from a reasonable mistake, in the Title VII filing. Instead, the Eighth Circuit held that Title VII claims are independent of other remedies available to aggrieved parties and thus must be pursued separately, stating: "that the time limitations appearing in [Title VII] are jurisdictional is clear." 616 F.2d at 379.

## II.

Since the filing of the inital petition, two additional circuits have reexamined the application of the tolling doctrine to the time requirements of the Age Discrimination in Employment Act of 1967 (ADEA). These cases have significance to the instant petition not only because the ADEA time requirements closely parallel Title VII time requirements but also because, as noted in the initial petition, decisions in the Title VII area are often cited as authority for decisions in the ADEA context and vice versa.

In *Coke v. General Adjustment Bureau,* 616 F.2d 785 (5th Cir. 1980), the Fifth Circuit decided that the 180-day notice requirement of 29 U.S.C. § 626(d)(1) is subject to

equitable tolling where a defendant, through misleading conduct, has induced a plaintiff to delay filing suit until the limitations period has run. The Court analogized to its decision in *Chappell v. Emco Machine Works Co.*, 601 F.2d 1295 (5th Cir. 1979), which held that the parallel notice requirement of Title VII was subject to equitable tolling. Last month, however, the Fifth Circuit decided to reconsider *en banc* its decision in *General Adjustment.* 49 U.S.L.W. 1033 (August 26, 1980).

In *Wright v. Tennessee,* No. 77-1546 (6th Cir. August 11, 1980) (decided *en banc* ), the Sixth Circuit, changing its ruling on rehearing and overruling its own precedents, held that ADEA time requirements could be tolled. The Sixth Circuit had held as recently as January, in *Wright v. Tennessee,* 613 F.2d 647 (6th Cir. 1980), that the filing period of that section was a jurisdictional prerequisite to maintaining an action and was therefore not subject to tolling. By reason of its most recent action in *Wright,* the Sixth Circuit overruled its decision in *Hiscott v. General Electric Co.,* 521 F.2d 632 (1975), which it had followed in several later cases. *Hiscott* had held that there was "nothing in the Act nor in its legislative history to indicate that compliance with the notice provision was intended to be tolled or excused." 521 F.2d at 634.

Both the Fifth Circuit's decision in *General Adjustment* and its subsequent action to reconsider, as well as the Sixth Circuit's reversal in *Wright* of its prior position, are further indications of the continued unrest which Courts of Appeals are experiencing in determining the appropriateness of a tolling doctrine in the similar statutory schemes embraced by ADEA and Title VII.

## III.

In both the Eighth Circuit case of *Harris v. Norfolk & Western Railway,* 616 F.2d 377 (8th Cir. 1980), and the instant Sixth Circuit case, plaintiffs made mistakes of procedural law which they argued should be excused because the correct course of action was unclear; claiming as well that to apply Title VII requirements to bar claims because of delay due to such mistakes would be harsh and inequitable and would defeat Title VII's general purpose of eliminating discrimination in employment. As was discussed earlier, the Sixth Circuit has accepted such an approach and the Eighth Circuit has rejected it. At the end of last Term, this Court, in *Mohasco Corp. v. Silver,* 100 S.Ct. 2486 (1980), rejected similar arguments, albeit in a slightly different context, and refused to excuse a failure to meet filing deadlines under Title VII.

At issue in *Mohasco* was the interpretation of 42 U.S.C. § 2000e-5(e), requiring that a claim be filed with the EEOC within 300 days of discharge, and of 42 U.S.C. § 2000e-5(c), forbidding the filing of such a claim with the EEOC in a state having its own state agency for the processing of discrimination claims until the state agency resolves the claim or until 60 days after filing with the state agency, whichever is earlier. The plaintiff in *Mohasco* had filed only a claim letter with the EEOC 291 days after discharge, which the EEOC had filed immediately with the appropriate state agency. Thus, when the requisite 60-day period had expired with no action by the state agency, 357 days had elapsed from the date of plaintiff's discharge.

Seeking relief from the 300-day time limit of § 2000e-5(e), the plaintiff argued for different interpretations of

the term "filed" in the two applicable statutory sections. He also argued that an existing EEOC regulation had permitted the very filing he had made. The Second Circuit accomodated the plaintiff and, in language similar to that used by the Sixth Circuit in the instant case to justify its application of a tolling doctrine, stated that excusing the failure to comply with the applicable time requirements was required by "the strong federal policy in ensuring that employment discrimination is redressed. . . ." *Silver v. Mohasco Corp,* 602 F.2d. 1083, 1087 (2d Cir. 1979).

This Court, however, reversed the Second Circuit, holding that the claim was barred, invalidating the EEOC regulation which would have permitted it, and stating that:

> even if the interests of justice might be served in this particular case . . . in the long run experience teaches that strict adherence to the procedural requirements specified by the legislature is the best guarantee of evenhanded administration of the law." 100 S.Ct. at 2497.

Thus, notwithstanding an EEOC regulation which permitted the filing made by the *Mohasco* plaintiff, and despite arguments that a decision which barred the claim would be inequitable and contrary to Title VII's purpose to insure that discrimination in employment is remedied, this Court nonetheless refused to excuse the late filing by the plaintiff in *Mohasco.* Although *Mohasco* provides some further indication of this Court's view of the "jurisdictional" nature of Title VII time requirements, and appears not to accommodate the approach taken by the Sixth Circuit in the instant case, there was no discussion in

*Mohasco* of the equitable tolling doctrine. Thus, further guidance and clarification is needed with respect to whether tolling of Title VII time requirments is permissible.

The instant case is a perfect opportunity for the Court to provide the needed clarification, and presents for decision a far broader issue than this Court examined when it agreed to review the Second Circuit's decision in *Mohasco.* As important as the *Mohasco* decision was in interpreting certain Title VII time requirements, the ruling of that case is necessarily limited in comparison with the potential impact which a ruling in the instant case could have. *Mohasco* dealt with those limited number of instances when a Title VII plaintiff in a deferral state files his state complaint early enough to be within the 300-day provision of § 2000e-5(e) but late enough to run afoul of § 2000e-5(c). By contrast, the Court has an opportunity in the instant case to clarify, for a far greater number of potential Title VII plaintiffs, the general issue of whether they can be excused for equitable reasons from the consequences of a failure to meet the applicable filing limitations, and if so, what principles should guide lower courts in applying such a tolling doctrine.

## CONCLUSION

For all the reasons set forth herein, and in the original petition, this Court should grant certiorari to resolve whether the tolling doctrine is appropriate to the Title VII statutory scheme, and, if so, what the reach and application of that doctrine are.

Respectfully submitted,

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October 1, 1980

No. 79-1856

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## SUPPLEMENTAL MEMORANDUM OF PETITIONER

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This supplemental memorandum is filed to call the Court's attention to a recent Ninth Circuit decision not available when Eaton filed its earlier supplemental memorandum. The case, *Cooper v. Bell,* 628 F.2d 1208 (9th Cir. 1980), is yet another example of the continued confusion and conflict among the Circuits over the existence and application of a tolling doctrine to Title VII time requirements.

Ironically, the Solicitor General and the Equal Employment Opportunity Commission, in their brief as *amici curiae,* have quoted *Cooper* for the proposition that "there is now an 'emerging consensus' that 'Title VII filing periods are subject to equitable extension.' " (Brief at 9.) In fact, the *Cooper* Court's difficulty in deciding the appropriate role of a tolling doctrine in the context of Title VII time requirements is a direct result of the uncertainty posed by decisions of this Court and the confusion and conflict which have prevailed among the Circuits.

Indeed, even the Ninth Circuit's very reference in *Cooper* to a consensus that "seems to be" emerging among the circuit courts was accompanied by the citation of conflicting circuit court decisions, 628 F.2d at 1212, and by an express acknowledgment that "the Supreme Court has referred to the filing periods both ways [*i.e.*, as both jurisdictional prerequisites and as statutes of limitations]." *Id.* at 1212 n.7. Moreover, the court in *Cooper* took pains to confine its approval of tolling to administrative filing periods, continuing to cite with apparent approval its earlier decisions construing compliance with the time period between administrative action and court suit as "jurisdictional," and expressly noting the problem that would inhere in attempting to apply the tolling doctrine to the time period for filing suit which is involved in the instant case:

> The arguments in favor of equitable tolling are weakest regarding the third filing period, the time for commencement of court action. Congress expressly premised federal court jurisdiction on prior exhaustion of administrative remedies by providing that a federal employee could bring an employment discrimination suit within thirty days of receiving notice of final administrative action. 42 U.S.C. § 2000e-16(c) (1976). One possible interpretation of this provision is that it creates a temporally limited cause of action: if suit is not brought within thirty days, the cause of action expires. *See, Kirk* v. *Rockwell Int'l Corp.*, 578 F.2d 814, 823 (9th Cir.) (Hufstedler, J., concurring), *cert. denied*, 439 U.S. 1004, 99 S.Ct. 616, 58 L.Ed.2d 680 (1978). *But see, Bethel* v. *Jefferson*, 589 F.2d 631, 641-42 and n.64 (D.C.Cir. 1978). Furthermore, the employee is less likely to be harmed by rigid time limits at this stage of the proceedings than at the earlier two stages. By the time the third limitation period is triggered by the employees receipt of a right to sue letter, the employee has received counselling and has been expressly informed of his obligation to go forward within the thirty-day filing period.

All of the Ninth Circuit cases that have referred to Title VII filing periods as "jurisdictional" have involved the third filing period. *See, Mahroom* v. *Hook,* 563 F.2d 1369 (9th Cir. 1977), *cert. denied,* 436 U.S. 904, 98 S.Ct. 2234, 56 L.Ed.2d 402 (1978); *Cleveland* v. *Douglas Aircraft Co.,* 509 F.2d 1027 (9th Cir. 1975); *Wong* v. *The Bon Marche,* 508 F.2d 1249 (9th Cir. 1975). *Id.* at 1213-14 n.10.

The *Cooper* case also illustrates how circuit courts which have applied the tolling doctrine at all are in serious conflict over the circumstances in which it can appropriately be applied. The Ninth Circuit in *Cooper* established no fewer than seven stringent requirements that the party seeking tolling "must prove," including proof of "affirmative misconduct" by the party against whom relief is sought. *Id.* at 1214. In sharp contrast, the Sixth Circuit in the instant case applied a broad concept of forgiving "reasonable mistakes" and allowed tolling even while conceding that the plaintiff had made no claim of having been misled but had acted on "her own" (App. to Original Petition at 9a, n.5).

Thus, contrary to the assertion of the Solicitor General, a close examination of *Cooper* reveals that circuit courts continue to struggle with the various dicta of this Court and the conflicting circuit court opinions. In *Cooper,* the Ninth Circuit joins the various other Circuits discussed in the original petition in offering yet another position along the spectrum of opinion as to what if any Title VII time periods can be tolled, and the standards of conduct which will invoke such tolling.

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January 26, 1981

No. 79-1856

In The

# Supreme Court of the United States

October Term, 1979

THE EATON CORPORATION,
*Petitioner,*

v.

OLGA J. FOX,
*Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

## BRIEF OF RESPONDENT IN OPPOSITION

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TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

---

## BRIEF OF RESPONDENT IN OPPOSITION

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### STATEMENT OF THE CASE

On August 30, 1972, Olga J. Fox, an employee with thirty (30) years seniority, was released from employment when the Petitioner's heater plant was closed in Cleveland, Ohio. In the course of her employment, the Respondent had been on medical leave arising out of the birth of her two children. As of the date of the dismissal, Mrs. Fox had a total of 29.5 years of credited service, according to the Petitioner's computation. On October 23, 1973, suit was filed against the Petitioner in the Court of Common

Pleas of Cuyahoga County, Ohio alleging a breach of contract. The basis of this allegation was a discriminatory computation of Mrs. Fox's credited service, the discrimination being that Mrs. Fox was penalized by company policy which required maternity leave to commence with the beginning of the fifth month and to continue until authorization to return to work was granted by the company physician.

Subsequent to the initial pleadings, an Amended Complaint was filed alleging a Title VII violation under Section 2000e-5(f)1 of Title 42 of the United States Code (Title VII of the Civil Rights Act of 1964).

At the time of the initial filing, the state and federal courts had concurrent jurisdiction in all Title VII actions and suit was filed in the state court because the parties, the contract and the alleged violation all occurred in the State of Ohio.

At trial, the Title VII jurisdiction question was stipulated by counsel and acknowledged by the trial court. The trial court entered a judgment on behalf of the Petitioner on the facts and the Respondent appealed to the Ninth District Court of Appeals for the State of Ohio. Said court affirmed the decision of the trial court. The jurisdictional question was not addressed in that opinion.

Certiorari was granted to the Supreme Court of the State of Ohio. On December 15, 1976, the Ohio Supreme Court in *Olga J. Fox v. The Eaton Corporation*, 48 Ohio St. 2d 408 (1976), invoked for the first time the question of jurisdiction and ruled that the federal courts had exclusive jurisdiction for all Title VII violations. The action of the Supreme Court, therefore, reversed the factual findings of the lower courts and dismissed the matter sua sponte otherwise than on the merits. Respondent then

refiled her Title VII action in the Federal District Court for the Northern District of Ohio alleging essentially the same Title VII violations as had been pled in the state court. The Petitioner filed a Motion to Dismiss on the basis that the herein action had not been filed in the ninety (90) day provision of Section 2000e-5(f)1 of the Civil Rights Act of 1964.

Respondent argued that the dismissal by the Ohio Supreme Court was jurisdictional in nature, that the dismissal had been otherwise than on the merits, and that the ninety (90) day provision of Title VII was "tolled" during the pendency of the state action. The Motion to Dismiss was granted and the Respondent appealed to the Court of Appeals for the Sixth Circuit. On February 21, 1980, the decision of the Federal District Court was reversed and the Petitioner has now filed for a Writ of Certiorari with this Court.

## REASONS FOR DENYING THE WRIT OF CERTIORARI

### I. THE DECISION OF THE COURT OF APPEALS FOR THE SIXTH CIRCUIT FOR THE HEREIN CASE WAS CORRECT IN THAT AT THE TIME OF THE ORIGINAL FILING, THE STATE AND FEDERAL COURTS HAD CONCURRENT JURISDICTION TO HEAR CLAIMS UNDER SECTION 2000e-5(f)1.

Respondent argues that as of the filing of the original action in the Court of Common Pleas, Cuyahoga County, Ohio, the state and federal courts both had concurrent jurisdiction to hear alleged violations under Title VII. This concurrent jurisdiction continued in the state courts of Ohio

until the decision of *Olga J. Fox v. The Eaton Corporation,* 48 Ohio St. 2d 408 (1976). To date, the United States Supreme Court has not ruled on the question of concurrent state and federal jurisdiction, the question having been argued both ways by various circuits: See *Peterson v. Eastern Airlines,* 20 FEP Cases 1322 (W.D. Texas 1979); *Bennun v. Board of Governors,* 413 F. Supp. 1274 (D.N.J. 1976); *Peper v. Princeton University Board of Trustees,* 77 N.J. 55, 389 A.2d 465 (1978); *Vason v. Carrano,* 31 Conn. Super. 338, 330 A.2d 98 (1974) (holding state courts have concurrent jurisdiction); *Dickinson v. Chrysler Corp.,* 456 F. Supp. 43 (E.D. Mich. 1978); *Fox v. Eaton Corp.,* 48 Ohio St. 2d 408 (1976); *Lucas v. Tanner Bros. Contracting Corp.,* 10 FEP Cases 1104 (Arizona 1974) (holding federal courts have exclusive jurisdiction). There is likewise no language in the statute specifically excluding jurisdiction from the state courts, *see Dowd Box Co. v. Courtney,* 368 U.S. 502 (1962). The Respondent, therefore, argues that without a definitive jurisdictional ruling, timely filing in the state court fully met the requirements of Section 2000e-5(f)1.

## II. THE DISMISSAL OF THE RESPONDENT'S CLAIM BY THE OHIO SUPREME COURT ON JURISDICTIONAL GROUNDS CONSTITUTED A DISMISSAL OTHER "THAN ON THE MERITS" THEREBY TOLLING THE NINETY (90) DAY PROVISION OF SECTION 2000 OF TITLE 42 OF THE UNITED STATES CODE.

Respondent argues that the decision of the Ohio Supreme Court in the case of *Olga J. Fox v. The Eaton Corporation, supra,* raised for the first time the jurisdictional question in the Ohio courts. Since the ninety (90) day provision of Title VII was met in the state court, its validity remained in effect until the jurisdictional ruling by the

Ohio Supreme Court on December 15, 1976. It is also argued that since concurrent jurisdiction between the state and federal courts existed until the decision of the Ohio Supreme Court in *Fox v. The Eaton Corporation, supra,* the requirement of timely filing "the ninety (90) day provision" had been met. This is in compliance with a similiar set of circumstances, *see Bethel v. Jefferson,* 589 F.2d 631 (D.C. Cir. 1978). This in effect tolled the statute during the state court action and the dismissal by the Supreme Court sua sponte otherwise than on the merits permitted a timely filing in the Federal District Court.

## III. THE DECISION OF THE SIXTH CIRCUIT COURT OF APPEALS IN THE INSTANT CASE HAS LIMITED AND SINGULAR APPLICATION TO THE CASE AT POINT.

Respondent argues that the decision of the Sixth Circuit Court of Appeals in the herein case has extremely narrow, singular, and limited application. The application to other cases involving the tolling doctrine would be severely restricted by the facts involved.

## CONCLUSION

Respondent argues that the decision of the Sixth Circuit Court of Appeals to employ the equitable tolling doctrine in the herein case was just and proper in that the case should be heard on its merits. Respondent argues that the restrictions invoked by the limited application to the facts does not make it a good candidate or vehicle in terms of either the concurrent jurisdiction question or the validity of the tolling doctrine.

For the reasons herein set forth, the Respondent respectfully moves that the Writ of Certiorari be denied.

Respectfully submitted,

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# In the Supreme Court of the United States

OCTOBER TERM, 1980

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THE EATON CORPORATION, PETITIONER

*v.*

OLGA J. FOX

---

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT*

---

**BRIEF FOR THE UNITED STATES AND THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AS AMICI CURIAE**

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# In the Supreme Court of the United States

OCTOBER TERM, 1980

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No. 79-1856

THE EATON CORPORATION, PETITIONER

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT*

---

**BRIEF FOR THE UNITED STATES AND THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AS AMICI CURIAE**

---

## QUESTIONS PRESENTED

1. Whether the provision in Section 706(f)(1) of the Civil Rights Act of 1964, 42 U.S.C. 2000e-5(f)(1), allowing a person aggrieved by an alleged unlawful employment practice 90 days within which to file a civil action after receiving a notice from the Equal Employment Opportunity Commission informing him of his right to sue, is a statute of limitations subject to equitable tolling in certain circumstances.

2. Whether, if the 90-day period is subject to tolling, such tolling was appropriate in the particular circumstances of this case where the person aggrieved filed a civil action in state court within the 90-day period on the reasonable belief that state courts have jurisdiction of such actions.

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This brief if filed in response to the invitation of the Court to the Solicitor General to express the views of the United States.

## STATEMENT

1. Respondent Fox was employed by petitioner Eaton Corporation from 1942 to 1972. In August 1972, she was released from employment when the plant at which she was working closed. In October 1973, respondent brought an action in Ohio state court alleging that petitioner had violated a collective bargaining agreement by failing properly to compute her time spent on maternity leave in determining her eligibility for early retirement (Pet. App. 6a).

In 1974, after respondent filed a charge with and received a notice of her right to sue from the Equal Employment Opportunity Commission, she amended her state court complaint to add an allegation that petitioner had discriminated against her on the basis of sex, in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, by not giving her credit for the period she had been on maternity leave (Pet. App. 6a). Prior to trial, petitioner stipulated that respondent had a right to assert her Title VII claim in state court (*ibid*).

Following a trial on the merits, the state court entered judgment in favor of petitioner. That judgment was affirmed by the Court of Appeals of Ohio (Pet. App. 6a). On appeal to the Supreme Court of Ohio, that court, *sua sponte,* held that state courts lack subject-matter jurisdiction of Title VII claims. Accordingly, the Ohio Supreme Court, on December 15, 1977, reversed the lower court judgment in favor of petitioner and dismissed the Title VII action for lack of jurisdiction (Pet. App. 6a; 48 Ohio St. 2d 236 (1976)).

2.a. On February 18, 1977, respondent refiled her Title VII claim in the United States District Court for the Northern District of Ohio. Petitioner filed a motion to dismiss on

the ground that respondent had not commenced the action in federal court within 90 days of receiving her right to sue letter, as required by 42 U.S.C. 2000e-5(f)(1). The district court granted the motion, holding that it lacked subject-matter jurisdiction because the Title VII claim had not been asserted in federal court within 90 days after receipt of the notice of right to sue (Pet. App. 3a).

b. The court of appeals reversed and remanded for further proceedings (Pet. App. 13a). The court unanimously held that the 90-day time limit for filing suit in federal court is in the nature of a statute of limitations and is subject to equitable tolling (Pet. App. 7a, 13a). The court further held, one judge dissenting, that tolling was appropriate in the circumstances of this case because respondent had acted with "great diligence" (Pet. App. 12a) in asserting her Title VII claim and because she had a "reasonable basis" for believing that state courts have jurisdiction to decide Title VII case (*ibid.*).[1] The court of appeals did not decide whether state courts have jurisdiction of Title VII claims; it concluded only that respondent reasonably could have believed that they do, noting that state and federal courts are divided on the question and that "the question * * * is not an easy one, particularly given the absence of any language in [Title VII] specifically excluding jurisdiction from the state courts" (Pet. App. 10a n.7).

The court also noted that because the record does not indicate whether respondent's administrative charge of discrimination had been timely filed with the EEOC and

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[1]Judge Celebrezze, dissenting, stated that he agreed with the principle that Title VII time limitations are in the nature of statutes of limitations and that equitable principles should apply in circumstances which warrant their application; but on the facts of this case, he found no equitable basis for tolling the 90-day time period (Pet. App. 13a-14a).

because the district court did not address this question in granting petitioner's motion to dismiss, this "issue will have to be determined by the district court on remand" (Pet. App. 6a n.1).

## DISCUSSION

This case involves only the application of the tolling doctrine to the 90-day period within which the person aggrieved may file a civil action after receiving a notice from the EEOC of his right to sue. 42 U.S.C. 2000e-5(f)(1). No question is presented regarding the tolling of the initial 180-day or 300-day period for filing an administrative charge with the EEOC under 42 U.S.C. 2000e-5(b)—the issue involved in most of the Title VII tolling cases. The district court must determine on remand whether respondent filed a timely charge with the EEOC (Pet. App. 6a n.1). If respondent's charge filed with the EEOC was not filed within the applicable period and no reason appears for excusing her from complying with the filing requirements, the district court will be required to dismiss the suit. This would, of course, moot the question whether the 90-day suit-filing period could be tolled in the circumstances of this case.

In any event, the court of appeals correctly held that the 90-day period within which a suit may be filed under 42 U.S.C. 2000e-5(f)(1) after receipt of a notice of right to sue is a period of limitations subject to tolling in appropriate circumstances. Whether the tolling doctrine was properly applied in the peculiar circumstances of this case is a fact-bound question that does not warrant review by this Court. Review of this case is especially inappropriate because the

question whether state courts have jurisdiction of Title VII claims is now before the Court in *Minnick* v. *California Department of Corrections*, No. 79-1213 (argued Dec. 2, 1980). If this Court holds, as we argue in our brief in *Minnick* (at 11-15),[2] that state courts do not have jurisdiction of Title VII claims, future litigants could not fairly assert a reasonable belief to the contrary that would justify tolling of the 90-day limitations period. If, on the other hand, the Court holds that state courts have jurisdiction of Title VII claims, state courts will not dismiss for lack of jurisdiction and there will be no occasion to toll the limitations period in order to render timely a subsequent filing in federal court. In any event, given the uncertainty on the question of state court jurisdiction, and petitioner's stipulation that respondent could bring her action in state court, tolling was appropriate in this case.

1. This Court has recognized that federal courts ordinarily have the equitable power to excuse compliance with statutorily established periods for the commencement of actions in appropriate circumstances. *American Pipe & Construction Co.* v. *Utah*, 414 U.S. 538, 558-559 (1974); *Burnett* v. *New York Central R.R.*, 380 U.S. 424 (1965); cf. *Holmberg* v. *Armbrecht*, 327 U.S. 392, 397 (1946); *Herb* v. *Pitcairn*, 325 U.S. 77 (1945). Indeed the principle is so deeply embedded in our jurisprudence that it must be assumed to apply to a particular limitations period

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[2]We are furnishing copies of our brief in *Minnick* to the parties in this case.

in the absence of an indication to the contrary in the language or legislative history of the statutory provision. *Glus* v. *Brooklyn Eastern Terminal*, 359 U.S. 231, 234-235 (1959).[3]

There is nothing in the language or legislative history of Title VII to overcome the presumption that tolling principles should be applied in the Title VII context. To the contrary, in introducing the House version of Title VII in the Senate, the bill's sponsors stated that the "suit against the respondent * * * brought by * * * the complaining party, would proceed in the usual manner for litigation in the Federal courts." 110 Cong. Rec. 6549 (1964) (remarks of Sen. Humphrey); see also *id.* at 7213 (interpretive memorandum submitted by Senators Clark and Case). Although the House version of Title VII was later amended on the Senate floor (see *Teamsters* v. *United States*, 431 U.S. 324, 352 (1977)), the amendments strengthened—not weakened—the private right of action and made private suits the primary method of obtaining judicial enforcement of Title VII.[4]

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[3]This Court has likewise rejected the contention that where the same statute both creates a cause of action and establishes a limitation on the time within which the cause of action may be brought, " 'the time limitation is an integral part of [the] new cause of action . . . that * * * is irretrievably lost at the end of the statutory period.' " *American Pipe & Construction Co.* v. *Utah, supra*, 414 U.S. at 559, quoting *Glus* v. *Brooklyn Eastern Terminal, supra*, 359 U.S. at 232. See also *Burnett* v. *New York Central R.R., supra*, 380 U.S. at 427 n.2. Thus, the fact that Title VII both creates a right of action and provides a 90-day period for the filing of a suit does not suggest that the cause of action is "irretrievably lost," as a jurisdictional matter, at the end of the 90 day period.

[4]As Senator Humphrey explained them, the Senate amendments removed a provision in the House bill requiring that an individual obtain prior permission from a Commission member before bringing suit, Section 707(c) of H.R. 7152 (1963) (110 Cong. Rec. 12721 (1964)); added a provision authorizing courts to award attorneys' fees to private

In the final version of Title VII, Congress made the "private right of action * * * an essential means of obtaining judicial enforcement of Title VII." *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 45 (1974). Congress also recognized that in bringing a private Title VII action, the "plaintiff is * * * vindica[ting] 'a policy * * * considered of the highest priority.' " *Christiansburg Garment Co.* v. *EEOC*, 434 U.S. 412, 418 (1978), quoting *Newman* v. *Piggie Park Enterprises*, 390 U.S. 400, 402 (1968).

In 1972, when Congress amended Title VII to authorize the EEOC to bring suit,[5] it was careful to retain the private right of action because, in its view, the "primary concern should be to protect the aggrieved person's option to seek a prompt remedy." S. Rep. No. 92-415, 92d Cong., 1st Sess. 24 (1941); see also Section-by-Section Analysis of the Equal Employment Opportunity Act of 1972, 118 Cong. Rec. 7167 (1972); *General Telephone Co.* v. *EEOC*, No. 79-488, (May 12, 1980) slip op. 7.[6] This uniform congressional emphasis on the importance of the right of individuals to seek judicial redress under Title VII is contrary to the notion that Congress intended to deprive Title VII plaintiffs of the benefits of the tolling doctrine that has been applied generally under other federal statutes.[7]

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plaintiffs (110 Cong. Rec. 12724 (1964)); and removed a provision in the House bill authorizing suit by the Equal Employment Opportunity Commission (110 Cong. Rec. 12721 (1964)).

[5]*See Occidential Life Insurance Co.* v. *EEOC*, 432 U.S. 355, 359 (1977).

[6]The history of congressional concern for individual rights under Title VII surely is more compelling than that relied upon by the Court in *American Pipe & Construction Co.* v. *Utah, supra*, 414 U.S. at 559, n.29, to bolster the conclusion that generally accepted tolling principles should apply in cases brought under the antitrust laws.

[7]This Court also has emphasized that federal courts, in exercising the broad equitable powers granted by Title VII, possess ample authority " 'to locate "a just result" in light of the circumstances peculiar to the case.' " *Occidental Life Insurance Co.* v. *EEOC*, 432 U.S. 355, 373 (1977), quoting *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 424-425 (1975), and *Langnes* v. *Green*, 282 U.S. 531, 541 (1931).

Against this background, it is not surprising that this Court appears to have given 42 U.S.C. 2000e-5(f)(1) its natural reading as providing a 90-day statute of limitations for the filing of a civil action, not as placing limitations on the subject matter jurisdiction of the district court. In *Mohasco Corp.* v. *Silver*, No. 79-616 (June 23, 1980), the Court observed that the complainant had commenced his action in federal district court 91 days after the EEOC formally advised him of his right to sue but that the employer "did not assert [the complainant's] failure to file the action within 90 days as a defense" (slip op. 3 & n.9).[8] If satisfaction of the requirement of filing within the 90-day period were regarded as jurisdictional, then the employer's failure to raise non-compliance with this requirement as a defense would not have disposed of the defect. Thus, the Court appears to have viewed the 90-day period as a statute of limitations, which must be asserted as an affirmative defense or be lost. Fed. R. Civ. P. 8(c), 8(d), and 12(b).

This view of the 90-day suit-filing period is consistent with this Court's characterization of the 180-day or 300-day period for the initial filing of a charge of discrimination with

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[8]In its supplemental memorandum (at 5-7), petitioner suggests that *Mohasco* furnishes some support for its position that tolling was inappropriate in this case. *Mohasco*, however, involved the initial charge-filing period, not the 90-day period for filing a civil action after the EEOC has considered the matter. Moreover, as petitioner acknowledges (Supp. Memo. 6-7), there was no discussion of the equitable tolling doctrine in *Mohasco*, no doubt because there was no allegation in that case that the complainant had relied on the EEOC regulation at issue there. *Mohasco* concerned the broader question whether the literal language of 42 U.S.C. 2000e-5(b) and (d) requiring the filing of a charge with the EEOC within 300 days in deferral states should be displaced in an entire category of cases (where the complainant filed a charge with the state agency within 300 days), irrespective of the equities of the particular case.

the EEOC as a statute of limitations. See *Occidental Life Insurance Co.* v. *EEOC*, 432 U.S. 355, 371-372 (1977);[9] see also *Delaware State College* v. *Ricks*, No. 79-939 (Dec. 15, 1980), slip op. 6-11; *Electrical Workers* v. *Robbins & Myers, Inc.*, 429 U.S. 229, 241-244 (1976) (characterizing the 180-day or 300-day charge-filing period as a "limitations period"). Because the charge-filing and suit-filing periods are statutes of limitations, and in view of the absence of any expression of legislative intent to the contrary, they may be tolled under proper circumstances.[10] This conclusion is especially appropriate under Title VII, "a statutory scheme in which laymen, unassisted by trained lawyers, initiate the process." *Love* v. *Pullman*, 404 U.S. 522, 527 (1972).[11]

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[9]A principal issue in *Occidental Life Insurance Co.* v. *EEOC* was whether state statutes of limitations should govern the bringing of a civil action by the EEOC. 432 U.S. at 366-372; *id.* at 373-384 (Rehnquist, J., dissenting). It would seem to follow that the 90-day period within which a private party may bring such a civil action also should be viewed as a period of limitations.

[10]This Court has indicated that the filing of a timely charge with the EEOC is a "jurisdictional prerequisite" to the filing of a civil action under 42 U.S.C. 2000e-5(f)(1). *Electrical Workers* v. *Robbins & Myers, Inc.*, *supra*, 429 U.S. at 240; *Alexander* v. *Gardner-Denver Co.*, *supra*, 415 U.S. at 47; see also *United Air Lines, Inc.* v. *Evans*, 431 U.S. 553, 555 n.4 (1977) ("[t]imely filing is a prerequisite to the maintenance of a Title VII action"). These cases do not suggest, however, that a charge may never be considered "timely" for this purpose if it is filed outside the applicable 180-day or 300-day charge-filing period. If those periods are viewed as statutes of limitation, as the Court has indicated they should be, a charge filed after their expiration could nonetheless be regarded as "timely" for purposes of invoking the EEOC's processes (and later the jurisdiction of the federal courts) if the limitations period were properly extended under the doctrine of equitable tolling. In those circumstances, the person aggrieved would have satisfied the "jurisdiction prerequisite" of exhausting his administrative remedies in a timely fashion, in accordance with the opinions cited above.

[11]It may be that the occasions on which tolling is proper may be far more limited with respect to the 90-day period for filing a civil action, because that period will have been commenced by receipt from the EEOC of a notice of a right to sue explaining the steps the individual must follow. The person aggrieved may not have the benefit of similar advice or assistance before he first files a charge with the EEOC to initiate Title VII's processes.

Perhaps for this reason, the Court appears to have acknowledged that equitable tolling of the Title VII limitations periods may be appropriate in certain circumstances. *Electrical Workers* v. *Robbins & Myers, Inc.*, *supra*, 429 U.S. at 237 & n.10.

Nor, contrary to petitioner's contention (Pet. 7-9), is this Court's holding in *Electrical Workers* v. *Robbins & Myers, Inc.*, *supra*, 429 U.S. at 236-240, that the period for filing a charge with the EEOC may not be tolled during the pendency of grievance procedures, inconsistent with the recognition of general principles of tolling under Title VII. The Court there rejected the assertion that the charge-filing period should be extended as a matter of course in an entire category of cases—all those in which grievance procedures have been invoked. This broad proposition is far different from applying the well-settled equitable doctrine that concededly applicable limitations periods may be tolled in the circumstances of an individual case where the equities require.

Moreover, there is now an "emerging consensus" that "Title VII filing periods are subject to equitable extension." *Cooper* v. *Bell*, 628 F. 2d 1208, 1212 (9th Cir. 1980). See *Hart* v. *J.T. Baker Chemical Co.*, 598 F. 2d 829, 832-33 (3d Cir. 1979); *Stebbins* v. *Nationwide Mutual Insurance Co.*, 469 F. 2d 268, 269) (4th Cir. 1974), cert. denied, 410 U.S. 939 (1973); *Chappell* v. *Emco Mach. Works Co.*, 601 F. 2d 1295, 1297-1302 (5th Cir. 1979); *Harris* v. *Walgreen's Distribution Center*, 456 F. 2d 588, 592 (6th Cir. 1972); *Bethel* v. *Jefferson*, 589 F. 2d 631, 641-42 (D.C. Cir. 1978). Several other courts of appeals have left the question open, concluding that the failure to comply with the time limitations could not, in any event, be excused in the circumstances of the particular case. See, *e.g.*, *Daughtry* v. *King's Dept. Stores, Inc.*, 608 F. 2d 906 (1st Cir. 1979); *Cottrel* v. *Newspaper Agency Corp.*, 590 F. 2d 836, 838 (10th Cir. 1979); *Keyse* v.

*California Texas Oil Corp.*, 590 F. 2d 45, 47 (2d Cir. 1978); *Smith* v. *American President Lines*, 571 F. 2d 102, 109 (2d Cir. 1978).[12]

Thus, the court of appeals correctly determined that the time limitations in Title VII may be tolled in appropriate circumstances, and no clear division among the circuits is presented on this question. Review by the Court of this issue therefore is not warranted.

2. The question whether the suit-filing period was properly tolled in the peculiar circumstances of this case—where respondent filed her Title VII action in state court within the 90-day period and petitioner stipulated that she was entitled to bring her action there—does not warrant review by this Court. The legal question whether state courts have jurisdiction of Title VII actions, which underlies the tolling issue in this case, may be resolved by the Court's decision in *Minnick* v. *California Department of Corrections*, *supra*. There would then be no cases in the future involving an erroneous filing in state court on which a tolling claim could be based.

In any event, the court of appeals' decision in this case is fully consistent with this Court's decision in *Burnett* v. *New York Central R.R.*, *supra*. In that case, a state court dismissed the FELA plaintiff's action because venue was improper, and his subsequent filing in federal district court

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[12]There is, however, language in several Ninth Circuit decisions, indicating that the 90-day suit filing period is "jurisdictional." See *Cooper* v. *Bell*, *supra*, 628 F. 2d at 1213, and cases cited. But these characterizations do not appear to have been essential to the decision in the cases, either because the suit-filing period was not actually involved, *ibid.*, or because the circumstances would not have warranted excusing compliance with the limitations period in any event. *Mahroom* v. *Hook*, 563 F. 2d 1369, 1374-1376 (9th Cir. 1977); *Cleveland* v. *Douglas Aircraft Co.*, 509 F. 2d 1027, 1030 (9th Cir. 1975); *Wong* v. *The Bon Marche*, 508 F. 2d 1249, 1250-1251 (9th Cir. 1975). This language is, moreover, inconsistent with the language, legislative history, purposes, and judicial construction of Title VII discussed in the text.

occurred after the expiration of the applicable limitations period. The Court nevertheless held the federal filing timely, observing that the injured worker did not sleep on his rights and that the railroad could not have relied upon the policy of repose embodied in the limitations period because it was aware that the plaintiff was actively pursuing his FELA remedy. 380 U.S. at 429-430; see also *American Pipe & Construction Co.* v. *Utah, supra*, 414 U.S. at 558. The same is true in the instant case. Respondent did not sleep on her rights: she pursued her Title VII remedy in state court well within the 90-day limitations period. And here, not only did petitioner not rely on the policy of repose embodied in the limitations period—it stipulated to her right to bring the action in state court and litigated its Title VII liability there. And here, unlike in *Electrical Workers* v. *Robbins & Myers, Inc.*, *supra*, 429 U.S. at 237-238, respondent was not pursuing a separate cause of action in her initial filing. She merely asserted "the same statutory claim in a different forum" and "[gave] notice to [petitioner] of that statutory claim." *Id.* at 238. Tolling of the limitations period is appropriate in these circumstances. This is especially so given the uncertainty with respect to state court jurisdiction of Title VII claims,[13] thereby rendering reasonable respondent's belief that state courts have jurisdiction. See Pet. App. 10a-11a; cf. *Charles Dowd Box Co.* v. *Courtney*, 366 U.S. 502 (1962).[14]

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[13]Prior to the Ohio Supreme Court's decision in 1976, the only reported opinion holding that state courts lack jurisdiction of Title VII claims was the decison of the state trial court in *Lucas* v. *Tanner Bros. Contracting Co.*, 10 Fair Empl. Prac. Cas. Cases 1104 (Ariz. Sup. Ct. 1974).

[14]We note that the right-to-sue letter the EEOC sent to respondent informed her of her right to "institute a civil action in the United States District Court having jurisdiction over your case" (48 Ohio St. 2d at 237-238). The letter did not state, however, that federal jurisdiction is exclusive. As we have pointed out (see pages 3-4, *supra*), we have taken the position in *Minnick* v. *California Department of Corrections* that state courts do not have Title VII jurisdiction. The only issue presented here, however, is whether respondent reasonably believed that they do. There is therefore no occasion to hold the petition in this case pending a decision in *Minnick*.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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